

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
78964-76H BY BRIAN AND BECKY BEMIS)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the February 18, 1993, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 78964-s76H by Brian and Becky Bemis is denied.

NOTICE

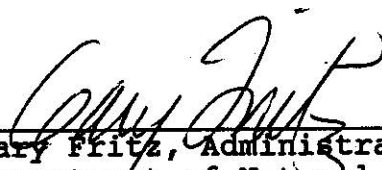
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

CASE # 78964

part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 31 day of March, 1993.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 1st day of April, 1993 as follows:

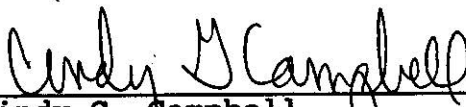
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Missoula, MT 59806
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
78964-S76H BY BRIAN AND BECKY BEMIS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on December 17, 1992, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Brian and Becky Bemis under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Brian and Becky Bemis appeared at the hearing by and through Brian Bemis.

Objector John Germann appeared at the hearing pro se.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

EXHIBITS

Applicants offered three exhibits for inclusion into the record.

Applicants' Exhibit 3 is a copy of a part of a page of the June 18, 1992 issue of the *Missoulian* concerning Montana stream flows. This exhibit was accepted without objection.

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Applicants' Exhibit 5 is a copy of a letter dated December 7, 1992, to the Department from Margaret P. McClendon. Mr. Germann objected to the inclusion of this letter into the record because, according to Mr. Germann, Mrs. McClendon had told him that she had not used the water from Waddell Ditch because there was never enough water. However, Mr. Germann did not produce a signed statement from Mrs. McClendon as Applicants did. Objection is overruled and Exhibit 5 is accepted into the record.

Applicants' Exhibit 6 is a copy of the old Riverditch watering schedule for the places on the West side of the County Road only [sic]. Applicants' intent for introducing this schedule was that the rotation for the Waddell Ditch was the same as the River Ditch (also known as the Tiedt-Nicholson Ditch) as noted on the schedule. Mr. Germann objected to the inclusion of this exhibit in the record as being irrelevant and that it may have been superseded. However, Mr. Germann did not produce any evidence to reinforce that objection. The objection is overruled and the exhibit is accepted into the record.

Objector offered 12 exhibits for inclusion into the record.

Objector's Exhibit 1 a through f consists of six photographs which show water ponding at various locations as a result of Applicants' irrigation. Objector submitted this exhibit to illustrate that Applicants had a history of wasting water and adversely affecting their neighbor by allowing the water to pond on neighboring property. Mr. Bemis objected to the inclusion of these photographs because after these photographs were taken, a

dam and drainage ditch were installed to solve the problem and that this water comes from the River Ditch and has nothing to do with the Waddell Ditch. Since these photographs have nothing to do with the Waddell Ditch and Applicants testified there have been steps taken to remedy the situation, the objection is sustained and Objectors Exhibit 1-a through f are not accepted into the record.

Objector's Exhibit 2 is a copy of a two-page letter dated July 27, 1989 to Mr. Darwin Titeca from David L. Pengelly. Applicants objected to the inclusion of this exhibit into the record since it addressed their predecessor's practices, not the Applicants'. Objector said he was offering this exhibit to show past use of Waddell Ditch water. For that purpose only, the Hearing Examiner overruled Applicants' objection and accepted the Exhibit into the record.

Objector's Exhibit 3 consists of a copy of a two-page letter dated August 24, 1992, to John Germann from David Pengelly; a copy of two-page letter dated August 20, 1992, to John Germann from David Pengelly; the first page of a copy of a letter to Brian Bemis from Michael P. McLane dated August 14, 1992; and a copy of a three-page letter to Brian Bemis from David Pengelly dated August 10, 1992, for a total of eight pages. Objector offered these letters for the record to show Applicants could not control the water they have rights to and to show adverse effect to Applicants' neighbor's property. Applicants' objected to the inclusion of this exhibit into the record on the basis that the

water discussed in these letters is Rock Creek Company Water. In order to make the necessary improvements to the system, Applicants must have the approval of the Rock Creek Company. Applicants have taken the problem before the Rock Creek Company Board of Directors for their approval. (A stockholder cannot make improvements to an irrigation company's ditch without the company's approval.) According to Applicants, the improvements will most likely be done in the spring of 1993. However, since the criteria for issuance of a permit do not include a record of an applicant's previous management of other waters or adverse effect to property rights, the objection is sustained and Objector's Exhibit 3 will not be accepted into the record.

Objector's Exhibit 4 consists of two pages which are copies of a notice. The first page is an undated notice to Applicants from Gary Boyer that Mr. Boyer and Mr. Germann are calling for their first and second water right on the waste water in Waddell Ditch. The second page is an undated notice to Rick and Rhonda Twardoski which contains an identical statement from Gary Boyer. Objector offered this exhibit to show that a downstream user, Gary Boyer, did not agree to Applicants' proposed appropriation of the waste water in Waddell Ditch. Mr. Bemis objected to the inclusion of this exhibit into the record stating that Mr. Boyer objected to Applicants' use of the water before they had a water right for it which is what, *inter alia*, the notice says. The notice says nothing concerning objections to the instant

application. Objection sustained and Objector's Exhibit 4 is not accepted into the record.

Objector's Exhibit 5 consists of five pages. The first page is a copy of a memorandum to File G99722 by Owen and Erna Butler from Michael P. McLane dated June 20, 1990, concerning a pre-hearing meeting for that application. The second page is a copy of a letter dated June 20, 1990, sent to all parties of the Owen and Erna Butler proceedings. The third and fourth pages are a copy of an Order Granting Motion to Suspend Proceedings in the Matter of Application G99722-76H by Owen and Erna Butler issued by John E. Stults, Hearing Examiner on September 7, 1990. The fifth page is a copy of an Acknowledgement and Acceptance by John E. Stults, Hearing Examiner, dated October 24, 1991, of Applicant's withdrawal of Application in the Matter of Application G99722-76H by Owen and Erna Butler. Objector offered this exhibit to show that the Overturf Ditch users do not approve of the Waddell Ditch users using the Overturf Ditch. Applicants objected to the inclusion of this exhibit into the record because it was past history and that there is, in fact, an agreement between the Overturf Ditch users and the Waddell Ditch users for the Overturf users to use the Waddell Ditch to carry Overturf water. The Hearing Examiner fails to see the relevance of this exhibit to this proceedings; therefore, the objection is sustained and Objector's Exhibit 5 is not included in the record.

Objector's Exhibit 6 consists of two pages and is a copy of a DNRC Review Abstract of Water Right 76H-W107885. Objector

offered this exhibit to show Applicants are duplicating their water rights by the instant application. Applicants objected to the inclusion of this exhibit into the record because the proposed use does not duplicate the Rock Creek right. Since the Hearing Examiner agreed to take official notice of the Department records, which would include the Rock Creek Water Company's filed rights, the objection is overruled and the abstract is accepted into the record.

Objector's Exhibit 7 consists of two pages. The first page is a copy of an unsigned letter which is a part of the claim file for Water Right W147818-76H. The second page is a copy of the first page of Statement of Claim W147818-76H. This exhibit is in the Department file which has been accepted into the record in its entirety.

Objector's Exhibit 8 is a photograph developed on August 6, 1992, showing Waddell Ditch where it enters into Twardoskis' property. This exhibit was entered into the record without objection.

Objector's Exhibit 9 is a photograph developed on August 6, 1992, of Waddell Ditch where it leaves Twardoskis' property and enters into Applicants' property. This exhibit was accepted into the record without objection.

Objector's Exhibit 10 is a photograph developed on August 6, 1992, of Objector's field which Objector described as burnt because there wasn't sufficient water for him to irrigate. Applicants objected to the inclusion of this exhibit because the

picture was taken shortly after the field was hayed and water can be seen in Waddell Ditch in the upper right hand corner of the photograph. Objector stated the water in the Waddell Ditch is backed up from his springs. Objector intended to show that Waddell Ditch is not a reliable water source. For that purpose only the objection is overruled and the exhibit is accepted into the record.

Objector's Exhibit 11 is a photograph developed on August 6, 1992, of Applicants' property which illustrates, according to Mr. Germann, that Applicants have sufficient water to irrigate and do not need additional water. Applicants objected to the inclusion of this exhibit in the record because it is not an accurate description of the portion that would be irrigated by the proposed appropriation. Objector stated it does show part of the lower property. Whether an applicant has other water rights that can be used on other portions or even the same portion of property is not relevant as long as the additional water can be used beneficially without waste. The objection is sustained and Objector's Exhibit 11 is not included in the record.

Objector's Exhibit 12 consists of two pages. The first page is a copy of a letter to Objector dated June 15, 1992, from David Pengelly. The second page is a letter dated June 26, 1992, to Brian Bemis from David Pengelly on Objector's behalf. Objector offered this exhibit to further show that Applicants are not capable of handling water properly. Applicants objected to the inclusion of this exhibit into the record since the letters deal

with Rock Creek waters and a ditch on the Taylor property and have nothing to do with the instant application. Further Applicant stated that all the points of diversion are in for the proposed appropriation. Past practices cannot be used against a proposed new appropriation. The Rock Creek water use problems were discussed in the ruling for Objector's Exhibit 3, *supra*. For these reasons the objection is sustained and Objector's Exhibit 12 is not accepted into the record.

Department's Exhibit 1 is a copy of a portion of USDA aerial photograph number 30081-179-76 taken August 2, 1979, which shows certain drainages, ditches, and Applicants' proposed point of diversion. Mr. Germann objected to the inclusion of this exhibit into the record because it was not clear enough. However, using the *Ravalli County Water Resource Survey* as an additional reference, the map served well during the hearing. Therefore, this exhibit is accepted into the record as a reference to show the locations of the various ditches, creeks, and other pertinent areas and the Hearing Examiner takes official notice of the *Ravalli County Water Resource Survey*, pages 14 and 16.

The Department file was made available for review by all parties. Mr. Germann objected to the flow measurement taken in Waddell Ditch by Applicants becoming a part of the record. These measurements were made by Applicants using an accepted method and Objector did not produce any measurements to the contrary. The objection is overruled and the file is accepted into the file in its entirety.

PRELIMINARY MATTERS

The parties to this proceeding requested the Hearing Examiner take official notice of the Department's records, specifically the Rock Creek Water Company statements of claim of existing rights, the Waddell Ditch users' individual statements of claim, as well as other statements of claim for waste water. The Hearing Examiner agreed to take official notice of the aforementioned statements of claim. The Hearing Examiner also takes official notice of any water rights of record for the waters of Bunkhouse Creek, Ike Williams Gulch, Overturf Gulch, and Waddell Creek and of the Soil Conservation Service Irrigation Guide for Montana to determine the recommended flow rate for irrigation in the area of the application.

The record was left open until January 25, 1993, for submission of additional evidence by both parties by January 15, 1993, and rebuttal by either party to the additional evidence submitted. On January 14, 1993, the Department received from the Applicants four pages of water measurements and calculations and calendars of May and June, 1992, which indicate when Applicants and other users of Waddell Ditch were irrigating. On January 19, 1993, the Department received two pages of written testimony by John Germann; three pages which are a report to the Court by Water Commissioner, Tom Gale, a hand drawn map showing the Waddell Ditch as it crosses the Germann and Butler properties; and two pages of calculations dated July 18, 1989, for measuring

flow using cross sectional area times velocity. Neither party submitted rebuttal to the other's additional evidence.

The Hearing Examiner, having reviewed the record in the matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Montana Code Ann § 85-2-302 states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Brian and Becky Bemis duly filed the above-entitled Application with the Department on December 31, 1991. (Department file.)

3. Pertinent portions of the file were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source on September 16, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated October 13, 1992. (Department file.)

4. Applicants seek to appropriate 1.62 cubic feet per second up to 51.72 acre-feet per year of the waters of an unnamed

tributary of the Bitterroot River at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, Township 4 North, Range 21 West, Ravalli County, Montana.¹ The proposed means of diversion is an existing wooden headgate and ditch. Applicants propose to appropriate up to 51.00 acre-feet of water per year for irrigation and up to .72 acre-feet of water per year for stock water. The proposed places of use for irrigation are 5.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 12.00 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 34. The proposed places of use for the stock water are SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 34. The proposed period of appropriation is from January 1 through December 31, inclusive of each year. The proposed period of diversion for the irrigation is from April 15 through October 15, inclusive of each year. The proposed period of diversion for the stock water is from January 1 through December 31, inclusive of each year. (Department file and testimony of Brian Bemis.)

The proposed flow rate calculates to be approximately 42.77 gallons per minute per acre. The standard recommended by the Irrigation Guide for Montana for that area is 17 gallons per minute per acre for a total required flow rate of 289 gallons per minute or .64 cubic feet per second for the entire 17 acres.

5. The waters Applicants seek to appropriate originate as waste water from flood irrigation of the bench lands. The waste water flows into Overturf Gulch, Ike Williams Gulch, Bunkhouse Creek, and Waddell Creek where it is then channelled into the

¹Unless otherwise stated, all land descriptions in this Proposal are in Township 4 North, Range 21 West, Ravalli County, Montana.

Waddell Ditch. The waste water from the flood irrigation has been flowing into these creeks and gulches since the Rock Creek Water Company began transporting water in its ditch for use on the bench properties. Although the *Ravalli County Water Resource Survey* dates the beginning of the Rock Creek Water Company (then known as the Rock Creek Ditch Company) as July 27, 1901, it is not clear whether the ditch served the bench properties at that time. It was serving the bench properties in 1957 when the survey was conducted. (Testimony of Brian Bemis and John Germann and the *Ravalli County Water Resources Survey*.)

6. Applicants measured the water in the Waddell Ditch flowing at a rate of 5.87 cubic feet per second on May 25, 1992; 6.15 cubic feet per second on May 26, 1992; 7.55 cubic feet per second on May 29, 1992; and 7.13 cubic feet per second on June 1, 1992. These measurements were made at some point on Applicants' property located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34. The streamflow calculation dated June 2, 1992, in the Department file reflects an average of the measurements taken over this period. (Department file, testimony of Brian Bemis, and additional evidence received from Brian Bemis after the hearing.)

7. Applicants reviewed the Department records in the Department's Missoula Water Resources Regional Office and determined there were no other water rights for the waste water they seek to appropriate. However, Applicants apparently did not review the Department records to determine whether there were any water rights from each of the sources, i.e., Overturf Gulch, Ike

Williams Gulch, Bunkhouse Creek, and Waddell Creek. (Testimony of Brian Bemis.)

8. Applicants have not quantified the amount of unappropriated water that flows from Overturf Gulch, Ike Williams Gulch, Bunkhouse Creek, or Waddell Creek before the water from each source flows into the Waddell Ditch. (Department file.)

9. Overturf Gulch, Ike Williams Gulch, Bunkhouse Creek, and Waddell Creek are all natural drainages with well-defined channels through which the waters of melting snows and rainfall, as well as the waste water from flood irrigation, drain from the bench area into the valley. (Department's Exhibit 1 and Ravalli County Water Resources Survey.)

10. Applicants own most of the proposed place of use and have a "fence agreement" for that part they do not own. Applicants did not produce the written consent of the person with the possessory interest in the part of the proposed place of use not owned by Applicants. (Testimony of Brian Bemis.)

11. There are no planned uses for which a permit has been granted or for which water has been reserved that would be adversely affected by the proposed appropriation. (Department records.)

12. Mr. Bemis insisted several times during the hearing that the information on the application form originated with the Missoula Water Resources Regional Office and that he did not know how some of that information was developed. (Testimony of Brian Bemis.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the

possessory interest, in the property where the water is to be put to beneficial use.

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The criteria for issuance of a permit clearly states that the Applicant must prove the criteria. Mont. Code Ann. § 85-2-311 (1991). An applicant is responsible for all the information on his application. If indeed, the Department did provide assistance to the Applicants as alleged, the applicant either accepts or rejects the Department's recommendation and is ultimately responsible for the information contained in that application. See Finding of Fact 12.

5. The proposed uses of the water, stock and irrigation, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1991) However, the flow rate requested, 1.62 cubic feet per second, for irrigation is excessive. See Finding of Fact 4. A flow rate exceeding 17 gallons per minute per acre would be wasteful and not a beneficial use of the water.

6. Applicants have not provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate, or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available.

See Findings of Fact 4, 5, 7, and 8. Applicants did measure the water flowing in Waddell Ditch; however, the Waddell Ditch is not the source. See Finding of Fact 5, 6, and 9.

Waste water loses its character when it reaches a natural channel such as Overturf Gulch, Waddell Creek, Ike Williams Gulch, or Bunkhouse Creek. See Finding of Fact 5. The Montana Supreme Court held in Popham v. Holloron, 84 Mont. 442, 275 (1929) that,

[Waste water] loses its character as vagrant fugitive water when it collects in a natural lake or stream.

There can be no question but that the water which, in times of storms and melting snow, flowed down the channel of Holloron gulch from the hills at its source and drained from the surrounding territory, formed a natural "water course" in that gulch within the meaning of that term, which is "a living stream with defined banks and channel, not necessarily running at all times, but fed from other and more permanent sources than mere surface water," which channel may at times be dry, so long as, to the casual glance, it bears the unmistakable impress of the frequent action of water which has flowed through it from time immemorable.

The main source of supply of all western streams is, primarily, the melting of snow and the fall of rain in our mountains and foothills, collecting each year in their accustomed channels and thence finding their way to the streams; this is a more permanent source than "mere surface water" diffused over the land by rains and melting snow. Such waters, thus forming a water course and flowing with regularity from year to year, although the channel may be dry for the major portion of each year, are a proper subject of appropriation and where such waters did not originally collect and flow down the channel, if through the instrumentality of man they have been made to do so and, through years of so flowing have acquired a permanent character as the natural drainage of the watershed, the original manner of the creation of the stream is immaterial; it is a "water course" with all the attributes of one wholly natural.

Where, also, vagrant fugitive waters have finally collected and reached a natural channel and thus lose their original character as seepage, percolating, surface, or waste waters, and flow with such regularity

as above described, whether from rains raising the surface of a lake until it overflows, seepage and percolation forming springs, surface water collecting in a canyon, artificial water over which the creator has lost control, water from artesian [sic] wells accidentally developed while drilling for oil, or water of a slough feed [sic] by seepage from irrigation, constitute a water course within the meaning of the law of water rights. (Cites omitted.)

7. The waste waters from the flood irrigation of the bench land have been flowing in these waterways for at least 20 years, most likely more than 20 years. See Finding of Fact 5. Therefore they have lost their character as waste waters and constitute a water course within the meaning of the law.

Before a permit can be issued, an applicant must provide substantial credible evidence there are unappropriated waters in the source of supply and be able to substantiate the amount of such unappropriated waters. Mont. Code Ann. § 85-2-311(1)(a) (1991). Here, Applicants are seeking to appropriate from four sources and have not supplied substantial credible evidence of the amount of unappropriated waters flowing from any one of these sources. See Findings of Fact 7 and 8. Applicants did submit measurements which appear to quantify the amount of water flowing in the Waddell Ditch during the last week of May and the first day of June; however, Waddell Ditch is not a source of water. See Finding of Fact 6. It is merely a conveyance.

8. An applicant is required to show by substantial credible evidence that all the criteria for issuance of a permit have been met. Mont. Code Ann. § 85-2-311(1) Applicants in this matter have failed to demonstrate there are unappropriated waters in the

source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate, or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Therefore, no finding is necessary as to whether the water rights of a prior appropriator would be adversely affected; whether the proposed means of diversion, construction, and operation of the appropriation works are adequate; whether the proposed use would interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; or whether the Applicants own the proposed place of use. In re Application 53221-s400 by Carney; In re Application 61333-s40A by Pitsch; In re Application 77335-s40A by Pitsch.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 78964-s76H by Brian and Becky Bemis is denied.

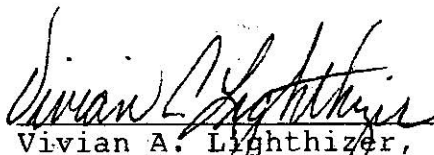
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception

filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 18th day of February, 1993.



Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 18th day of February, 1993, as follows:

Brian and Becky Bemis
P.O. Box 205
Darby, MT 59829

John Germann
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Cindy G. Campbell
Hearings Unit Legal Secretary